91-444

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. _____

LIVINGSTON CARE CENTERS, INC., and
CARE CENTERS OF MICHIGAN, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA and
ROBERT SPAIN, Jointly and Severally,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRASER TREBILCOCK DAVIS & FOSTER, P.C

BY: MICHAEL H. PERRY *

Business Address:
1000 Michigan National Tower
Lansing, Michigan 48933
Telephone: 517/482-5800

QUESTIONS PRESENTED

1. Whether claims based upon the wrongful termination of a Medicare provider agreement by the Secretary of Health and Human Services "arise under" the Medicare Act, 42 U.S.C. §1395 et seq?

2. If a claim based upon the wrongful termination of a Medicare provider agreement by the Secretary of Health and Human Services "arises under" the Medicare Act, do 42 U.S.C. §405(h) and §1395ii, particularly concerning the ability of one to bring a claim arising under the United States Constitution, violate one's rights to due process of law, guaranteed by U.S. Const. Amend V?

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JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 31, 1991. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States:

> "**Rights of persons charged with crimes; guaranty of life, liberty and property.** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person or subject for the same offence to be twice put in jeopardy of life of limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §405(h):

> "The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter."

42 U.S.C §1395ii:

> "The provisions of sections 406 and 416(j) of this title, and of subsections (a), (d), (e), (h), (j), (k), and (l) of section 405 of this title, shall also apply with respect to the subchapter to the same extent as they are applicable with respect to subchapter II of this chapter.

STATEMENT OF THE CASE

This case arises out of the Defendants' termination of Livingston Care Center's certificate to participate in the Medicare program. Plaintiffs Care Centers of Michigan and its wholly-owned subsidiary, Livingston Care Centers, owned and operated a nursing home in Howell, Michigan.

On August 12, 1986, however, the Michigan Department of Public Health ("MDPH") recommended that the United States Department of Health and Human Services ("HHS") and the Health Care Financing Administration ("HCFA") terminate LCC's certificate of participation in the Medicare Program. On September 8, 1986, HCFA determined that LCC's participation in the Medicare program would terminate effective October 2, 1986.

As a result of this decertification, the Plaintiffs were no longer able to provide services to Medicare beneficiaries. Decertification of the Plaintiffs under the Medicare program automatically triggered decertification of the Plaintiffs under the Medicaid program. MCL 333.21718; MSA 14.15(21718).

On June 30, 1989, Administrative Law Judge (ALJ) William E. Decker found that the MDPH had wrongfully recommended the decertification of the Livingston Care Centers, Inc. The ALJ found that Livingston Care Centers, Inc. substantially complied with the Social Security Act. The ALJ also found that MDPH failed to follow correct procedures in the decertification process.[1]

On August 11, 1988, the Plaintiffs filed an administrative claim with the Department of Health and Human Services. On or about January 11, 1989, the Department of Health & Human

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[1]The Appeals Council of the Office of Hearings and Appeals in the Social Security Administration recently denied HCFA's request for review. (Appendix C). This Court may take judicial notice of this development which occurred after the Court of Appeals decided and filed its opinion. Rutherberg v Security Management Company, Inc., 667 F2d 958 (11th Cir, 1982). See generally, Fed. R. Evid. 201(f) and McCormick, Evidence (3d ed.) §333, p. 935.

Services issued its Final Determination denying the Plaintiffs' administrative claim.

On or about July 10, 1989, the Plaintiffs filed their Complaint. They filed an Amended Complaint on or about November 1, 1989. In response to the Defendants' Motion to Dismiss, the District Court found that the Plaintiffs' claim arose under the Medicare Act. The District Court held that it lacked subject matter jurisdiction over this action. The Court also found that the Plaintiffs' Bivens'[2] action against the individual Defendant Robert Spain was also precluded.

The Court of Appeals affirmed the District Court's decision. It found that the District Court lacked jurisdiction to hear the Plaintiffs' claims because they "arose under" the Medicare Act. The Court of Appeals also held that 42 U.S.C. §405(h) did not deny the Plaintiffs their right to due process.

The Plaintiffs owned and operated a nursing home in Howell, Michigan. On August 12, 1986, the MDPH recommended to the HCFA that it terminate Livingston Care Centers' certification to participate in the Medicare program. HHS and HCFA determined on September 8, 1986 to terminate LCC's participation in the Medicare program effective October 2, 1986. It was, in fact, so terminated. The Medicare decertification also triggered an automatic decertification under the Plaintiffs' Medicaid "skilled services" program. As a result, the Plaintiffs could no longer also provide skilled services to Medicaid beneficiaries.

The MDPH was the Defendants' agent for purposes of inspecting Medicare providers and evaluating those provider's compliance with the Conditions of Participation. The Defendants' agent, the MDPH, was negligent in inspecting and evaluating the LCC in a number of ways, including its failure to:

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[2]Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388; 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971).

1. Assist the Livingston Care Center in complying with its Conditions of Participation to report to HCFA its contacts with Livingston Care Centers;
2. Assess the Livingston Care Center's prospects for achieving compliance within a reasonable time;
3. Follow proper survey methods and procedures outlined in the State Operation's Manual contrary to C.F.R. 405, 1906(b);
4. Precisely state deficiencies;
5. Cite accurately the law for the basis for any alleged deficiency;
6. Contact the provider to get a clarification or modification of the plan of corrections;
7. Include written reports of oral communications with Livingston Care Center;
8. Conduct a voluntary re-visit in response to the provider's plan of corrections. Instead, the MDPH recommended decertification of the Care Center even though it was in substantial compliance with the Medicare Conditions of Participation.

Additionally, the Defendant's agent negligently failed to follow its own rules, policies and procedures when it inspected and evaluated the Plaintiffs.

HHS and HCFA, by agreement, statute and/or regulation, had a duty to evaluate the MDPH recommendation in a reasonable and prudent manner. However, HHS and HCFA breached this duty. Neither Robert Spain, the HHS and HCFA employee specifically responsible for evaluating MDPH's recommendation, nor any other employee of HHS or HCFA ever personally inspected the Plaintiff's facilities. No employee of the HHS or HCFA ever investigated the claimed deficiencies before they terminated LCC's Medicare participation. They never considered the Plaintiffs' plan of corrections before terminating the Livingston Care Center's Medicare participation. HHS and HCFA terminated the Livingston Care Center's participation in the Medicare program

even though the Livingston Care Center substantially complied with the Conditions of Participation.

Furthermore, the negligent manner in which HHS, HCFA and Robert Spain evaluated and investigated MDPH's recommendation that Livingston Care Center's participation in the Medicare program be terminated, also denied the Plaintiffs their due process rights to a fair hearing and investigation. They arbitrarily and capriciously decided to revoke the Plaintiffs' participation in the Medicare program without inspecting or making any independent investigation.

Finally, HHS and HCFA had agreed with the Plaintiffs not to terminate Livingston Care Center's participation in the Medicare program without sufficient cause, justification or reason. However, HHS and HCFA breached their agreement when they terminated Livingston Care Center's participation in the Medicare program even though Livingston Care Center substantially complied with the Medicare Conditions of Participation.

As a proximate result of the Defendants' negligence, denial of due process and breach of contract, the Plaintiffs suffered substantial damages, including the wrongful Medicare decertification, the concomitant wrongful Medicaid skilled services decertification, a loss of their Medicare and skilled services Medicaid patients, a continuing loss of revenue and a loss of the value of the Plaintiffs' business.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The Plaintiffs alleged that the District Court had subject matter jurisdiction of Plaintiff's claims pursuant to the Federal Tort Claims Act, F.T.C.A., 28 U.S.C. §1346(b), 2671-2680 and federal question jurisdiction, 28 U.S.C. §1331.

REASONS FOR GRANTING THE WRIT

1. **The decision below is inconsistent with the decisions of this Court which have defined when a claim "arises under" the Social Security Act.**

This Court's decision in Bowen v Michigan Academy of Family Physicians, 476 U.S. 667; 106 S.Ct. 2133; 90 L.Ed.2d 623 (1986), should persuade this Court to find that the Plaintiffs' claims do not arise under the Social Security Act. Bowen held that Section 405(h) did not bar judicial review of regulations promulgated under Part B of the Medicare program. It recognized that not all claims which have some connection with the Social Security Act "arise under" the Social Security Act for purposes of Section 405(h). In Bowen, an association of physicians filed an action to challenge the validity of federal regulations which provided payments of different benefits to similarly-situated physicians. 476 U.S. at 668. During the course to its opinion, Bowen said that there is a "strong presumption" that Congress intended courts to review administrative actions. 476 U.S. at 670. Bowen also said that one opposing a court's exercise of its jurisdiction needs to present "clear and convincing evidence" that there should not be any judicial review of a particular situation. 476 U.S. at 671 and 680-81. Bowen said:

> "We ordinarily presume that Congress intends the executive to obey its statutory commands, and accordingly, that it expects the courts to grant relief when an executive agency violates such a command." 476 U.S. at 681.

Bowen said that the legislative history of the Medicare program indicated that Congress had intended to foreclose judicial review of only "amount determinations," which it characterized as "quite minor matters." 476 U.S. at 680. Bowen rejected the government's contention that Congress intended to prevent review of all "substantial statutory and constitutional challenges" to the

administration of Part B of the Medicare program. 476 U.S. at 680. Bowen distinguished between cases regarding the determination of "amounts" of benefits (no review available) from the "method by which such amounts are determined (judicial review available)." 476 U.S. at 680, n.11.

Plaintiffs' Complaint for money damages arises out of the Defendants' failure to follow the relevant statutory and regulatory commands. Plaintiffs are entitled to a judicial forum under the principles outlines in Bowen. Plaintiffs' injury stems from the "method" employed by Defendants in reaching the decision to decertify Plaintiffs. Plaintiffs are not seeking to litigate the failure to pay a particular amount of benefits. Such a claim, recognized by Bowen as a "minor matter," is not involved in this case. Rather, the Plaintiffs have challenged, as negligent and unconstitutional, the Defendant's decertification methods. Plaintiffs are not challenging an "amount determination." Thus, the case before the Court is distinguishable from cases where one litigates an "amount" determination.

The Court of Appeals' reliance upon Weinberger v Salfi, 422 U.S. 749; 95 S.Ct. 2457; 45 L.Ed.2d 522 (1975) was misplaced. Weinberger held that §405(h) precluded federal question jurisdiction over a constitutional challenge of a regulation which rendered one ineligible for Social Security benefits. Weinberger, 422 U.S. at 760-761. The instant Petitioners have not contested any benefits determination. The non-payment of Social Security benefits is not the issue.

Bowen made it clear that this Court had previously found in Weinberger that "the purpose of the first two sentences of §405(h). . .(was) to assure that administrative exhaustion will be required." Bowen, 476 U.S. at 679, n.8. Bowen also held that the requirement that one must exhaust one's administrative remedy is inapplicable where "there is no hearing, and thus no administrative remedy, to exhaust." 476 U.S. at 679, n.8.

In the instant case, there has been no hearing on the Plaintiffs' damages claim. According to Bowen, § 405(h) does not apply to this case.

The Plaintiffs do not seek judicial review of the Administrative Law Judge's favorable findings. The ALJ found that the Plaintiffs had been wrongfully decertified. As noted earlier, the Appeals Council has denied HCFA's request for review (Appendix C). The government appears to have exhausted its administrative remedy to seek review of the ALJ's decision. 42 U.S.C. §1395cc(h)(1). However, this has nothing to do with the Plaintiffs' request for damages arising out of the Defendants' wrongful and unconstitutional decertification. For this reason the Court of Appeals' reliance upon Weinberger is misplaced.

This Court's recent decision in McNary v Haitian Refugee Center, Inc., ___ U.S. ____; 111 S.Ct. 888; 112 L.Ed.2d 1105 (1991) supports the instant Plaintiffs' position that the District Court had jurisdiction to hear the Plaintiffs' claims. McNary found that §210(e) of the Immigration and Nationality Act, which was added by §302(a) of the Immigration Reform and Control Act of 1986, did not bar a Federal District Court from exercising general federal question jurisdiction over an action in which one alleged a pattern or practice of procedural due process violations by the Immigration and Naturalization Service during its administration of the "Special Agricultural Workers" (SAW) program. McNary held that the District Court had jurisdiction. Likewise, the Court should reach the same conclusion in this case.

In McNary, the statute in question, 8 U.S.C. §1160(e) described a scheme of administrative and judicial review of a SAW determination. 111 S.Ct. at 892-893. The Reform Act limited judicial review of a denial of one's SAW status to within the context of a judicial review of a deportation or exclusion order. McNary, 111 S.Ct. at 893. Because the Court of Appeals is the forum for judicial review of a deportation order, 8 U.S.C. §1105(a), McNary observed that the statute in question had "plainly foreclosed any review in the District Courts of individual denial of SAW status applications." 111 S.Ct. at 893. Further, without the initiation of a deportation proceeding against an unsuccessful SAW applicant, that applicant would never be able

to obtain judicial review of the decision in his or her particular case. 111 S.Ct. at 893.

McNary began its discussion by observing that:

1. SAW status was an important benefit for an alien.
2. There was no dispute that the INS routinely and persistently violated the constitution and statutes in processing SAW applications. 111 S.Ct. at 895.

Likewise, in the instant case, it is undisputed that Medicaid and Medicare certification was an important benefit for the Plaintiffs. Without those certifications, the Plaintiffs could not obtain payment for the services which they provided to Medicaid and Medicare recipients. Further, the Court must assume as true, at this stage in the litigation, the Plaintiffs' allegation that the government violated the constitution when it decertified the Petitioners. Meador v Cabinet for Human Resources, 902 F2d 474, 475 (6th Cir.), cert den. 111 S.Ct. 182 (1990).

McNary carefully reviewed the statute before it, noting that its "critical words" had referred only to a review "of a determination respecting an application for SAW status" and had not described a group of decisions or a practice or procedure employed in making that decision. 111 S.Ct. at 896. McNary also observed that the statute before it had clarified that its provision for judicial review referred to one denial or act, clearly indicating that the statute's earlier reference to a "determination respecting an application" described the denial of one's individual application rather than referring to a collateral challenge to the unconstitutional practices and policies used by the agency. 111 S.Ct. at 896.

Likewise, a careful and clear reading of 42 U.S.C. §405(h) should lead this Court to conclude that the District Court does in fact have jurisdiction to hear the instant Plaintiffs' challenge to the unconstitutional practices and policies used by the government in decertifying the Plaintiffs. The "findings of fact or decision" described in 42 U.S.C. §405(h) pertain the ALJ's review of the

Secretary's termination decision. 42 U.S.C. §1395cc(h)(1). However, the instant Plaintiffs are not challenging those findings. Those findings are given - the government acted improperly when it decertified the Plaintiffs. The Plaintiffs have not sought review of these findings. Section 405(h)'s jurisdictional limitation simply is inapplicable to this case.

McNary noted that the administrative appeals process involved in the matter before it did not "address the kind of procedural and constitutional claims respondents bring in this action. . . ." 111 S.Ct. at 896. Because that administrative appeals process had not addressed those claims, McNary held that the statute before it had "not contemplated" limiting judicial review of those claims. 111 S.Ct. at 896-897.

Likewise, the administrative appeals process relevant to the government's decertification of the Plaintiffs did not address the common law and constitutional claims which the Petitioners have brought in this action. 42 U.S.C. §405(h) simply did not contemplate a jurisdictional bar in such a case.

McNary also found that if Congress had intended the limited review provisions of its subject statute to include the claims made in McNary, "it could easily have used broader statutory language." 111 S.Ct. at 897. McNary found that Congress could have specifically stated that there was no jurisdiction of "all causes. . ." or "all questions of law and fact." 111 S.Ct. at 897. It failed to do so, and McNary held that the statute before it likewise failed to preclude the District Court's exercise of general federal question jurisdiction under 28 U.S.C. §1331. 111 S.Ct. at 897.

Likewise, 42 U.S.C. §405(h) referred specifically to review of the decertification decision. Plaintiffs do not seek review of that decision. Rather the Plaintiffs seek damages arising out of the government's wrongful and unconstitutional conduct.

In Heckler v Ringer, 466 U.S. 602, 615; 104 S.Ct. 2031; 80 L.Ed.2d 622 (1984), this Court held that §405(g) was the "sole avenue of judicial review for all claims arising under the Medicare Act." McNary distinguished Ringer. In so doing, it further

supported the instant Petitioner's claim. McNary noted that in Ringer, the Court had found that the claimant simply sought to be paid under the Medicare Act for a particular form of surgery. Ringer found that the claim before it, essentially a claim for payment for that type of surgery, was not "collateral" to the benefit claims, and required the claimants to first pursue their administrative remedies. McNary observed that the claimants, if unsuccessful in their administrative action, had a remedy under §405(g) to judicially challenge "all aspects of the Secretary's denial of their claims for payment." 111 S.Ct. at 897-898, citing Ringer, supra 466 U.S. at 617.

McNary noted that unlike the claimants in Ringer, the claimants before it had not sought a declaration that they were in fact entitled to SAW status. Prevailing upon the merits of their claim would not have the effect of establishing their entitlement to SAW status. Instead, they would only be allowed to have their files reopened and their application reconsidered. 111 S.Ct. at 898.

Likewise, the Petitioners do not seek to relitigate the question of whether they should have been decertified. The Administrative Law Judge has already found that the Petitioners should not have been decertified. However, this favorable decision, and the Appeals Councils' denial of HCFA's request for review (Appendix C), do not automatically render the Petitioners recertified. Rather, the Petitioners must apply for certification. Even having prevailed before the Administrative Law Judge, the Petitioners were not entitled to an automatic reinstatement of their status. There is no statutory or administrative authority for automatically reinstating a wrongfully decertified provider.

McNary also observed that if its respondents were unable to pursue their claims in the District Court, they:

> "Would not as a practical matter be able to obtain meaningful judicial review of their application denials or of their objections to INS procedures notwithstanding the review

provisions of §210(e) of the amended INA." 111 S.Ct. at 898.

Likewise, in the instant case, the instant Petitioners have not, as a practical matter, been able to obtain meaningful judicial review of and relief from their wrongful decertification. While the ALJ found in the Petitioners' favor, the ALJ could not award the Petitioners any damages. The ALJ could not order a recertification of the Petitioners. The only meaningful judicial remedy available to the Petitioners is a claim for damages.

McNary, relying upon Bowen, supra, observed:

> "It is presumable that Congress legislates with knowledge of our basic rules of statutory construction, and given our well-settled presumption favoring interpretations of statues that allow judicial review of administrative action. . .coupled with the limited review provisions of §210(e), it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review." 111 S.Ct. at 898.

The instant Petitioners request the Court to reach a similar conclusion in this case. This Court favors interpretations of statutes which allow judicial review. As in McNary, the subject statute contains a limited review provision. As in McNary, this Court should conclude that it is "most unlikely that Congress intended to foreclose all forms of meaningful judicial review." 111 S.Ct. at 898.

McNary obviously felt that it was significant that in order to obtain review in the Court of Appeals, an alien denied SAW status could only obtain judicial review if the alien voluntarily surrendered for deportation. McNary observed that "quite obviously, that price is tantamount to a complete denial of judicial review for most undocumented aliens." 111 S.Ct. at 898.

Likewise, the only way in which the instant Petitioners could have obtained judicial review of the decertification decision was to lose its hearing before the Administrative Law Judge and fail

to prevail before the Appeals Council. However, the Petitioners prevailed before the ALJ. It is ironic that one prevailing before an ALJ, and having demonstrated the wrongful nature of the government's conduct in the decertification process, is barred from obtaining an effective and meaningful remedy. The Petitioners respectfully request this Court not to require them to pay that price.

In its conclusion, McNary relied upon this Court's analysis in Bowen regarding the distinction between an "amount determination" and a challenge to the "method" by which the amount had been determined. McNary observed that "inherent in our analysis (in Bowen) was the concern that absent such a construction of the judicial review provisions of the Medicare statute, there would be 'no review at all of substantial statutory and constitutional challenges to the Secretary's administration of part B of the Medicare Program.' Id. at 680, 106 S.Ct. at 2141." McNary 111 S.Ct. at 899. This is precisely the issue in this case. The Plaintiffs have been made to pay the price for the Defendants' wrongful decertification. As in McNary, ". . .Bowen rather than Heckler" should support this Court's conclusion that "the strong presumption in favor of judicial review of administrative action is not overcome. . ." by 42 U.S.C. 405(h). 111 S.Ct. at 899. The Petitioners therefore respectfully request this Court to grant their Petition for Certiorari.

2. **This case presents an important question of constitutional law which has not been, but should be, settled by this Court.**

Schweiker v Chilicky, 487 U.S. 412, 4200 n.3; 108 S.Ct. 2460; 101 L.Ed.2d 370 (1988) noted that it did not need to decide whether §405(h) precluded a Bivens remedy. In so doing, the Court noted that "the exact scope of third sentence's (of §405[h]) restriction on federal-question jurisdiction is not free from doubt," and further observed that arguments can be made both for and against each side of the question. 108 S.Ct. at 2471 n.3. The

instant case includes a Bivens claim against the Defendant Robert Spain. This Court now has the opportunity to decide an important question of federal law. On this basis, the Court should grant the Petitioners' Petition for Certiorari. S.Ct. R. 10.1(c).

Count III of the Plaintiffs' First Amended Complaint alleges that the Defendant, though its various agents, denied the Plaintiffs their constitutional rights to due process. U.S. Const. Amend. V. Bowen, supra, observed that a "serious constitutional question" would arise if it had determined that §1395ii (which applies §405(h) to Medicare) denied one a judicial forum for one's constitutional claim. 476 U.S. at 681, n.12. That constitutional problem has arisen in this particular case. This Court now needs to resolve it.

Congress' ability to control the District Court's jurisdiction is subject to the Fifth Amendment. As noted in Battaglia v General Motors Corp., 169 F.2d 254, 257 (2nd Cir., 1948):

> "That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."

Plaintiffs had only about six (6) or so Medicare patients, but more than one hundred (100) of their approximately two hundred (200) patients were skilled Medicaid patients. Plaintiffs lost all of them as a result of the Defendants' actions. The administrative appeal process does not provide reimbursement for these losses. While a debate rages over to what extent Congress can control federal district court jurisdiction, "all agree that Congress cannot bar all remedies for enforcing federal constitutional rights." Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895, 921 n.113 (1984).

Even the instant Court of Appeals recognized that a complete proscription from hearing a constitutional claim would violate the Fifth Amendment (Appendix B, p. 7, citing Barmet Aluminum Corp. v William K. Reilly, 927 F2d 289, 294-296 (6th Cir. 1991). However, the Court erred when it relied upon Salfi. The instant Petitioners have not had a forum for their constitutional and damage claims.

While finding that U.S. Const. Amend. V.'s guarantee of due process of law did not require an evidentiary hearing before terminating one's continued entitlement to disability benefits under the Social Security Act, Mathews v Eldridge, 424 U.S. 319; 96 S. Ct. 893; 47 L.Ed.2d 18 (1976) made some observations which are especially significant to this case. During the course of its opinion, Mathews reviewed the elaborate and extensive administrative review procedure available to a person whose disability benefits had been terminated. 424 U.S. at 335-339. As noted above, there is no such extensive and elaborate administrative review process applicable to the instant Petitioners' damages claim.

In any event, while finding that due process did not require an evidentiary hearing, Mathews noted that the recipient would be "awarded full retroactive relief if he ultimately prevails. . ." 424 U.S. at 340. This factor was critical in Mathews' finding that due process did not compel an evidentiary hearing before termination.

In this case, the Plaintiffs have not received full retroactive relief despite the fact that the ALJ found that the Defendants had wrongfully decertified them. The Petitioners have no administrative remedy for damages or recertification. They have not received full retroactive relief. The Plaintiffs recognize that Mathews arose in the context of one seeking an administrative, rather than a judicial, pretermination evidentiary hearing. However, the instant Petitioners suggest that a Mathews-style analysis, applied to the instant issue, should persuade this Court to find that due process compels a finding that the federal courts have subject matter jurisdiction over constitutional damage claims.

At a minimum, this Court should grant the Petitioners' Petition to decide this important question.

The Petitioners are aware of the recent decision in Bodimetric Health Services v Aetna Life & Casualty, 903 F.2d 480 (7th Cir., 1990), cert denied, ___ U.S. ___; 111 S.Ct. 579; 112 L.Ed.2d 584 (1990),[3] which affirmed a district court's order dismissing a claim for lack of subject matter jurisdiction where the Plaintiff had sued the "intermediary" for improperly denying reimbursement claims under the Medicare Act, 42 U.S.C. 1395 et seq. Apart from its factual and legal differences with the instant case[4], Bodimetric did not involve the constitutional question now presented in this case. See, 59 U.S.L.W. 3258 (October 2, 1990). This Court now has the opportunity to decide this important issue.

CONCLUSION

Bowen, supra approvingly cited and quoted from Marbury v Madison, 1 Cranch. 137, 163 (1803) in which then-Chief Justice Marshall correctly observed that:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." Bowen, 476 U.S. at 670.

Bowen also quoted Chief Justice Marshall's opinion in United States v Nourse, 9 Pet. 8, 28-29 (1835) which Bowen said:

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[3]A denial of a petition for certiorari is not a decision upon the merits of the case. Brown v Allen, 344 U.S. 443; 73 S.Ct. 397; 97 L.Ed. 469 (1953).

[4]Bodimetric involved a claim for reimbursement for services. 903 F2d at 422-483. Bodimetric relied upon the "elaborate review provisions. . ." in 42 U.S.C. §405(h) and 42 U.S.C. §1395ff available for dissatisfied claimants. 903 F2d at 483. The Bodimetric damages claim was "inextricably intertwined" with a benefits claim. 903 F2d at 484. None of those factors are present in the instant case.

"laid the foundation for the modern presumption of judicial review:

'It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty is to decide questions of right, not only between individuals, administerial officer might, at his discretion, issue this powerful process. . .leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.'" Bowen, 476 U.S. at 670.

These principles support the Petitioners' position that the Court of Appeals erred when it found that the District Court lacked jurisdiction of the instant claims. The effect of this erroneous ruling is to allow the Defendants' wrongdoing to remain unsanctioned and unreviewable. Affirmance of the Court of Appeals' erroneous decision would leave the Petitioners' without a meaningful remedy. As noted in Bowen's approval of Nourse, "this anomaly does not exist; this imputation cannot be cast on the legislature of the united States." 476 U.S. at 670.

The Petitioners respectfully request this Court to find that the District Court has subject matter jurisdiction of the Petitioners' claims, grant the Petition for Certiorari and grant to the Petitioners such additional relief as this Court finds just and appropriate.

Respectfully submitted,

FRASER TREBILCOCK DAVIS & FOSTER, P.C.
Attorneys for Petitioners

By_____
Michael H. Perry (P 22890)

Dated: August 26, 1991

APPENDIX A - The Complete Opinion of the United States District Court for the Eastern District of Michigan, Southern Division - Flint Dated May 31, 1990.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

(Before the Honorable Stewart A. Newblatt,
United States District Judge)

Livingston Care Center, Inc.,
and Care Centers of Michigan, Inc.,
Plaintiffs,

Civil Action
No. 89-40200-FL

v.

United States of American and
Robert Spain, jointly and severally,
Defendants.

MEMORANDUM OPINION AND ORDER

Before the court is defendant's Motion to Dismiss. For the reasons stated hereafter and in defendant's brief, the motion is GRANTED. Plaintiff is a nursing home in Michigan, now proceeding in bankruptcy court. Plaintiff claims, under the Federal Tort Claims Act ("FTCA"), that defendant negligently decertified plaintiff as a Medicare provider. Plaintiff's status as Medicaid provider was automatically terminated as well, which resulted in extensive lost revenues to plaintiff and its eventual

bankruptcy. Under the federal Constitution, plaintiff further alleges that it was denied First Amendment and due process rights in the decertification proceedings. Lastly, plaintiff brings a Bivens action against defendant Robert Spain in his individual capacity for having "rubberstamped" the recommendation to decertify plaintiff.

Defendant argues that this Court lacks subject matter jurisdiction over the instant action. Defendant contends that at 42 U.S.C. 1395cc(b)(2) the Social Security Act provides an explicit and exclusive remedy for allegedly wrongful decertification decisions. See also 42 U.S.C. 405(g) (providing for judicial review) and 405(h) (Secretary's decision is final). According to defendant, judicial review of the agency's decision to decertify is therefore limited to that provided in the Social Security Act ("the Act").

The Act provides that "no action against the United States. . . .or any officer or employee thereof shall be brought. . . .to recover on any claim arising under this subchapter." 42 U.S.C. 405(h). The issue at hand, therefore, is whether plaintiff's claim "arises under" the Social Security Act.[1]

As noted earlier, an institution dissatisfied with the Secretary's decision to decertify is entitled to an administrative hearing and judicial review of the hearing result. 42 U.S.C. 1395cc(h)(1). The Supreme Court has found that, where Congress has provided meaningful safeguards or remedies in the Social Security Act for the rights of injured parties, complete relief and consequential damages are not available. Schweiker v. Chilicky, 487 U.S. ___, 109 S.Ct.64, 101 L.Ed.2d 370 (1988). In Chilicky, claimants for disability benefits sought damages for emotional distress and consequential damages stemming from delay in payment of benefits. The court found that "Congress chose specific forms

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[1]At argument, plaintiff cited Cleveland Ry. v. Hirsch, 204 F. 849 (1913) for its definition of "arises under." The Court is not persuaded that this case ends the matter, since more recent case law specifically germane to the Social Security Act exists, to be discussed herein.

and levels of protection for the rights of persons affected by incorrect eligibility determinations," and that an unwillingness to provide consequential damages could be inferred. Chilicky, 101 L.Ed.2d at 383.

Plaintiff argues that since the Act does not provide for money damages resulting from improper decertification, the remedy provided in the act is not "meaningful" according to the standards in Chilicky. In enacting the Medicare program, however, "Congress did not primarily seek to ensure the financial viability of individual health care institutions, but sought to ensure adequate health care for a specific group of people." Baptist Hospital v. Secretary of HHS, 802 F.2d 860, 868 (6th Cir. 1986). The Act provides for measures to correct wrongful decertification, and Congress could have provided for money damages in the same subsection. It did not, however, and, by the reasoning in Chilicky, this Court declines to provide a remedy under the Act that Congress apparently chose not to.

Plaintiff attempts to distinguish its own case from others cited by defendant in which claims have been found to "arise under" the Act. See Jarrett v. United States, 874 F.2d 201 (4th Cir. 1989); Marvin v. HEW, 769 F.2d 590 (9th Cir. 1985), cert. denied, 474 U.S. 1061 (1986); Northlake Community Hospital v. United States, 654 F.2d 1234 (7th Cir. 1981), reh. denied 1981. Plaintiff argues that those cases involve benefit determinations and that its claim for consequential damages is outside the intended scope of the Act. Plaintiff relies on Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986), for this proposition. His reliance on Bowen is misplaced, however.

In Bowen, plaintiff challenged the constitutionality of regulations promulgated under the Act. The court held there that section 405(h) does not preclude judicial review of the constitutionality of regulations. Plaintiff does not claim that section 1395cc(h) is unconstitutional. Further, the court in Bowen decided an issue for which no remedy was provided in the Act, unlike in the case at bar. The administrative remedy and judicial

review provided in section 1395cc of the Act constitute "clear and convincing evidence," as required by Bowen, that judicial review of plaintiff's claim for money damages is inappropriate. Bowen, 90 L.Ed.2d at 635.

The Court therefore finds that plaintiff's cause of action arises under the Social Security Act and that Congress has provided a meaningful remedy for the wrong claimed by the plaintiff. Since, according to defendant's brief, plaintiff has failed to exhaust his administrative remedies, the court lacks subject matter jurisdiction over this action.

Plaintiff's Bivens action against defendant Spain is also precluded by the Court's reasoning. In Schweiker v. Chilicky, supra, the Court found that where the Social Security Act provided plaintiffs with a meaningful remedy, a Bivens remedy against individual actors was inappropriate. Since the Court has already found that the Act provides a remedy for wrongful decertification, a Bivens remedy is therefore precluded as well.[2]

Defendant's Motion to Dismiss is GRANTED and the action DISMISS.

SO ORDERED.

(s) Stewart A. Newblatt

Dated: May 31, 1990

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[2]Given the holding of the Court, it is not necessary to reach the issue of the sufficiency of service upon defendant Spain.

APPENDIX B - Opinion of the United States Court of Appeals for the Sixth Circuit Dated May 31, 1991.

No. 90-1804

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LIVINGSTON CARE CENTER, INCORPORATED; CARE CENTERS OF MICHIGAN, INCORPORATED,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, ROBERT SPAIN,
Defendants-Appellees.

ON APPEAL from the Untied States District Court for the Eastern District of Michigan

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Decided and Filed May 31, 1991

Before: MARTIN and GUY, Circuit Judges; and EDWARDS, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. Livingston Care Center, Inc. and Care Centers of Michigan, Inc., operators of a

nursing home in Howell, Michigan, appeal the district court's dismissal of their claims for damages resulting from their termination as a Medicare provider. We are presented with the question of whether claims based on the wrongful termination of a Medicare provider agreement by the Secretary of Health and Human Services "arise under" the Medicare Act, *see* 42 U.S.C. § 1395 *et seq.*, and if so, does Congress' limitation in 42 U.S.C. § 1395ii, concerning the ability to bring a claim arising under the Constitution, violate due process rights? Livingston Care asserts its claims arise under the United States Constitution and the Federal Tort Claims Act. The district court dismissed these claims under Fed. R. Civ. P. 12(b)(6) on the basis that Livingston Care had failed to exhaust statutory administrative remedies. We affirm but on other grounds. We believe the district court lacked jurisdiction to hear these claims because they do "arise under" the Medicare Act. We also find no denial of constitutional due process under the statute.

We assume all material facts alleged in the Livingston Care's complaint are true and construe the complaint liberally, giving them the benefit of any doubt. *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475 (6th Cir.), *cert. denied*, 111 S. Ct. 182 (1990). Livingston Care Centers, inc., operates its nursing home facility in Howell, Michigan and it is owned by Care Centers of Michigan, Inc. On September 8, 1986, the United States Department of Health and Human Services determined that Livingston Care and Care Centers had failed to substantially comply with the provisions of their Medicare provider agreement, *see* 42 U.S.C. § 1395cc, and terminated their participation in the Medicare program effective October 2, 1986. This determination was based on the investigation and recommendation of the Michigan Department of Public Health. The Secretary of Health and Human Services's termination of the plaintiffs' Medicare certification automatically triggered termination of plaintiffs' Medicaid certification as well. Medicaid patients provided

Livingston Care with their primary source of income, and it filed bankruptcy proceedings because of these lost revenues.

On August 11, 1988, Livingston Care filed an administrative claim with the United States Department of Health and Human Services. The plaintiffs alleged that the Department of Health and Human Services and Robert Spain, the federal employee who evaluated the Michigan Department of Public Health recommendation, negligently terminated their participation in the Medicare program. The Secretary of Health and Human Services denied this claim, but on June 30, 1989, an administrative law judge, after a hearing on the merits of the change, found that the plaintiffs had substantially complied with the requirements of the Social Security Act and the Michigan Department of Health had wrongfully recommended their decertification. There are no further administrative remedies available to the plaintiffs, who timely filed this suit in the United States District Court for the Eastern District of Michigan.

Plaintiffs first cause of action alleges that the defendants negligently terminated their certification as a provider of Medicare services. They also allege that they were denied their due process rights in the termination proceedings. Jurisdiction is asserted under the provisions of the Federal Tort Claims Act, codified at 28 U.S.C. §§ 1346(b), 2671-2680, and the statutory grant of jurisdiction over federal questions, codified at 28 U.S.C. § 1331, which includes those questions arising under the Constitution of the United States.

We begin by noting that participation in the Medicare program is a voluntary undertaking. *Baptist Hospital v. Secretary of Health & Human Services*, 802 F.2d 860, 869 (6th Cir. 1986). Providers of health care who choose to participate in the federally sponsored program for the aged and disabled do so with no guarantee of solvency. *See id.* at 869-870. Just as those who choose to serve individuals not covered by Medicare assume the

risks of the private market, those who opt to participate in Medicare are not assured of revenues. As is evident here, participation in Medicare involves a degree of risk which increases directly with the percentage of patient services paid for with government funds; the economic rule which instructs that diversification decreases risk does not stop working just because the government becomes involved.

To clarify the nature of the issues in this case, we detail the provisions of the Medicare Act under which the Secretary acted and judicial review of the Secretary's actions is prescribed.

The Secretary's power to terminate a Medicare agreement with a provider participating in the program is set out at 42 U.S.C. § 1395cc(b)(2) which provides, in pertinent part:

> The Secretary may refuse to enter into an agreement under this section or, upon such reasonable notice to the provider and the public as may be specified in regulations, may refuse to renew or may terminate such an agreement after the Secretary
>
> > (A) has determined that the provider fails to comply substantially with the provisions of the agreement, with the provisions of this subchapter and regulations thereunder, or with a corrective action required under section 1395ww(f)(2)(B) of this title . . . .

The Medicare Act allows for providers, such as the plaintiffs in this case, to receive administrative and judicial review of the Secretary's decision to terminate:

> [A]n institution or agency dissatisfied with a determination by the secretary that it is not a provider of services or with a determination described in subsection (b)(2) of this

> section shall be entitled to a hearing thereon by the Secretary (after reasonable notice) to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

42 U.S.C. § 1395cc(h)(1). This review procedure is not plenary. Section 405(h) of Title II of the Social Security Act has been statutorily incorporated into the Medicare Act "to the same extent" that it applies to Title II. 42 U.S.C. § 1395ii. Section 405(h) provides:

> The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. *No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.*

42 U.S.C. § 405(h) (emphasis added).

The plain language of 405(h), as incorporated by 1395ii, precludes the federal courts from entertaining claims based on the jurisdictional provisions of the torts Claims Act, § 1346 of Title 28, or the statutory grant of jurisdiction over federal questions, § 1331 of Title 28, if the claims "arise under" the Medicare Act.

The first issue we must address, whether the plaintiffs' claims "arise under" the Medicare Act, is easily answered. In *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Supreme Court addressed the effect of 405(h) and the meaning of "arising under" within that section. *Salfi* involved a constitutional challenge to the requirements of 42 U.S.C. §§ 416(c)(5) and (e)(2) which require

spouses and step children to be related to a deceased for nine months in order to receive social security benefits. The Court concluded that the district court lacked jurisdiction to hear the claims due to the bar on § 1331 claims imposed by the last sentence in § 405(h), ruling that the claim arose under the Social Security Act because the Act provided "both a standing and substantive basis for the presentation of [plaintiff's] constitutional contentions. . . .[,]" and the plaintiff was seeking social security benefits. *Id.* at 760-761. In the present case, Livingston Care is seeking consequential damages resulting from the alleged wrongful termination under the Medicare Act. It is asserting negligence in the decertification process, a procedure established in the Medicare Act to ensure adequate Medicare services. As in *Salfi*, the Act provides both the "standing and the substantive basis" for the plaintiff's claims. Under the plain language of 405(h), plaintiffs' claims, based on § 1331 and § 1346 of Title 28, should be precluded as "arising under" the Medicare Act.

This simple analysis brings us to the second and much more complex issue: does the limiting effect of § 405(h), as incorporated into the Medicare Act by § 1395ii, violate the due process clause of the Constitution. Plaintiffs assert *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), directs us to provide a judicial forum for their claims. In *Michigan Academy*, an association of physicians challenged the validity of federal regulations which provided payments of different benefits to similarly situated physicians. *Id.* at 668. The Court addressed the question of whether Congress, in enacting § 1395ff or § 1395ii, precluded judicial review of regulations promulgated by the Secretary to govern Medicare contracts between the Secretary and private health insurance carriers. The Court, after noting that § 1395ff explicitly authorizes judicial review, concluded that § 405(h), as incorporated by § 1395ii, precludes review of benefit determinations made by the Secretary but not the method by which the determination is made. *Id.* at 675. The Court added, "[o]ur disposition avoids the 'serious

constitutional question' that would arise id we construed § 1395ii to deny a judicial forum for constitutional claims arising under Part B of the Medicare program." *Id.* at 681 n.12. This footnote is fatal to plaintiff's reliance on *Michigan Academy*.

In *Michigan Academy*, the plaintiffs were seeking review of regulations crated by the Secretary under the authority of § 1395ff for use in determining benefits. The Court merely held the explicit language of the Act provided for such review. The plaintiffs in this case seek a different remedy under a different provision of the Medicare Act. Like the statute at issue in *Michigan Academy*, § 1395ff, the statute at issue in this case, § 1395cc, explicitly provides for judicial review. *See* 42 U.S.C. § 1395cc(h)(1). Also like § 1395ff, § 1395cc judicial review is limited by the language of § 405(h), a incorporated by § 1395ii. However, the plaintiffs in this case are not seeking review of regulations promulgated under § 1395cc, nor are they seeking review of the actual termination decision made under the authority of § 1395cc. The plaintiffs seek a cause of action that would allow consequential damages because of their wrongful termination as a provider of Medicare services under § 1395cc. This goes far beyond any issue confronted in *Michigan Academy*.

If Congress completely proscribed the federal courts from hearing constitutional claims, it might violate the due process clause of the fifth amendment. *See Barmet Aluminum Corp. v. William K. Reilly*, 927 F.2d 289, 294-296 (6th Cir. 1991). However, we do not encounter that problem here. As the Supreme Court stated in *Salfi*, 422 U.S. 749,

> [T]he plain words of the third sentence of § 405(h) do not preclude constitutional challenge. They simply require that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards which are applicable to nonconstitutional claims arising under this Act. The result is not only unquestionable

> constitutionality, but it is also manifestly reasonable, since it assures the Secretary the opportunity prior to constitutional litigation to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions of the Social Security Act.

Id. at 762. Section 1395cc explicitly provides for judicial review of termination decisions made by the Secretary. Under the principles set forth in *Michigan Academy*, this review would include review of any regulations developed by the Secretary for applying § 1395cc, but it cannot be stretched to include review in an action for consequential damages resulting from wrongful termination. Congress proscribed such claims when it enacted § 1395ii.

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX C - Letter from Administrative Appeals Judge, Larry K. Banks, Department of Health & Human Services to Alvin N. Jaffe, Assistant Regional Counsel, Office of the General Counsel - Region V Dated July 11, 1991

Department of Health &
Human Services — Social Security Administration

Refer to:
S3GC
Docket No. 000-51-7010

Office of Hearings and Appeals
P.O. Box 3200
Arlington, VA 22203

July 11, 1991

Alvin N. Jaffe
Assistant Regional Counsel
Office of the General Counsel - Region V
105 W. Adams, 19th Floor
Chicago, IL 60603

Dear Mr. Jaffe:

Re: Livingston Care Center, Inc., 1333 West Grand River, Howell, Michigan 48843

The request for review of the hearing decision in this case has been considered.

Health Care Financing Administration Regulation (42 CFR 498.83) provides in relevant part that the Appeals Council may dismiss, deny, or grant a request for review by the Health Care Financing Administration.

The Appeals Council has concluded that there is no basis for granting the request for review. The Council finds that the decision of the Administrative Law Judge is based on substantial evidence which is the reviewing standard applied by the Appeals Council in cases of this nature. Accordingly the request for review is hereby denied and the hearing decision stands as the final decision of the Secretary in this case.

In reaching this conclusion, the Appeals Council considered the arguments submitted on behalf of the Health Care Financing Administration as part of the request for review filed in this case, and which are dated August 29, 1989. The Appeals Council was of the opinion that many of the arguments submitted were duplicative of those considered by the Administrative Law Judge and that, under the facts of this particular case, review of the decision of the Administrative Law Judge was not warranted.

Sincerely yours,

/S/
Debra Morriss
Administrative Appeals Judge

/S/
Larry K. Banks
Administrative Appeals Judge

cc:
Robert W. Stocker, II
Livingston Care Center
ALJ Decker, Grand Rapids, MI
RCALJ, Chicago, IL

APPENDIX D - LIST OF PARTIES

Pursuant to Supreme Court Rule 29.1, the Petitioners report that:

1. Care Centers of Michigan, Inc., one of the instant Petitioners, is the parent of its wholly owned subsidiary, Livingston Care Centers, Inc.;

2. There are no other parent or subsidiary companies, within the meaning of Supreme Court Rule 29.1, to be listed.